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In the Supreme Court of the United States

OCTOBER TERM, 1980

HONOLULU SPORTING GOODS COMPANY, LTD.,
A DIVISION OF ZALE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

BERNARD JEWELER
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether the Board, as a remedy for petitioner's unlawful grant of wage increases to its warehouse employees during the pendency of a representation petition and following the union's request for recognition, properly ordered petitioner to bargain with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 3a-26a) are reported at 239 N.L.R.B. 1277.

JURISDICTION

The judgment of the court of appeals (Pet. App. 83a-85a) was entered on May 5, 1980. A petition for rehearing and suggestion for rehearing en banc was denied on July 9, 1980 (Pet. App. 82a). The petition for a writ of certiorari was filed on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 87a-89a.

STATEMENT

Honolulu Sporting Goods Co. ("the Company"), after refusing to recognize and bargain with a Union [1] claiming to represent a majority of the Company's warehouse employees, altered the employees' basic wage structure and granted them much larger wage increases than they otherwise would have obtained (Pet. App. 3a-4a). The Board found that the pay raises were granted in response to, and in an effort to undermine, the Union's organizational cam-

[1] Hawaii Teamsters and Allied Workers, Local 996, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

paign and were, therefore, violative of Section 8(a)(1), 29 U.S.C. 158(a)(1), of the National Labor Relations Act (Pet. App. 7a-13a, 21a). The Board further found that the Company's unlawful conduct precluded the possibility of a fair election and warranted the issuance of a bargaining order (*id.* at 21a). The court of appeals affirmed (*id.* at 1a-2a).

The Company no longer challenges the finding that its conduct violated the Act.[2] Rather, it assails the Board's finding that a bargaining order was appropriate to remedy the violation. Secondarily, the Company questions the Board's conclusion that the Union had achieved majority status when the violation occurred.

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[2] However, petitioner incorrectly asserts (Pet. 2, 4) that the Board found the "timing" of the wage increase to be lawful but not the amount. Although the Board found that the Company's decision to grant step increases based on merit and longevity "was made before the advent of the Union's campaign and was not in response to the Union's efforts" (Pet. App. 13a), in finding the revisions in the wage structure and the raises based thereon unlawful, the Board relied on both "the timing and extensive nature of the upward revisions * * *" (*ibid.*). Moreover, petitioner's assertion (Pet. 2-3) that the Company considered the wage structure—as opposed to individual wage levels based thereon—inadequate and undertook a comparative wage survey prior to its knowledge of the Union's recognition demand is contrary to an express Board finding (Pet. 13a):

> [N]o management official took any action directed at securing wage-schedule revisions or the taking of area wage surveys relative to warehouse employees until after the Union requested recognition and filed its petition. And then such action was initiated by Landa, an attorney whose responsibilities were in the area of labor relations, rather than by officials whose responsibilities normally included wage, salary, or personnel administration.

1. It is undisputed that at the time it demanded recognition, the Union had secured valid authorization cards from five of the Company's warehouse employees. Rejecting the Company's contention that the warehouse unit was comprised of 10 employees, the Board concluded that there were only nine, and that consequently the Union enjoyed majority status when its recognition demand was rejected.

The Board based that finding on the following facts (Pet. App. 15a-16a). At all material times there were a total of nine job positions in the bargaining unit. For a number of years, one of those positions had been filled by employee Carol James, an inventory control clerk. During April 1976, however, James was granted maternity leave with a scheduled July 1, 1976 return date, pursuant to the provisions of the Company's written maternity leave policy.[3] Accordingly, a temporary replacement, Karen Schubach, was hired to fill James' job in the interim. Schubach, who resigned two weeks before James returned as scheduled, held James' position at the time the Union demanded recognition. Although she also held the job at the time the Company announced the unlawful wage increases for regular unit employees, Schubach did not receive a pay raise. Neither she nor James signed a union authorization card.

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[3] That policy provides, in pertinent part (Pet. App. 16a):

> When an employee requests a maternity leave, the employee's job should not be permanently filled during such leave unless the job is of such a nature that it must be filled and can only be filled if filled by a permanent replacement. The job may be filled on a temporary basis, but any individual hired on such a temporary basis must be informed that the job is a temporary one due to a maternity leave.

The Board concluded that James was properly includable in the unit because she had, at all relevant times, a reasonable expectancy of reemployment (Pet. App. 15a). The Board also found that Schubach was not properly includable since she had been hired on a temporary basis. Moreover, the Company had not, so far as the record revealed, even considered retaining her after James' return, and had not asserted any intent or plan to employ more than nine employees in the Honolulu warehouse facility (*id.* at 16a-17a).

2. Having found that the Union once represented a card majority of the Company's warehouse employees, the Board applied the criteria set out in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969), and determined that the Company's subsequent unlawful conduct was "so pervasive and extensive that the possibility of erasing its effects on the employees and insuring a fair election by the use of traditional remedies is slight[,] [a]nd, therefore employee sentiment, as expressed by authorization cards, is best protected by a bargaining order" (Pet. App. 19a). The Board explained that although "there was but a single unfair labor practice, * * * it encompassed a massive wage increase whose scope and timing were clearly designed to undermine the Union's majority status" (*ibid.*). In assessing the impact of the Company's conduct upon the election process, the Board quoted, as "directly applicable to the facts herein" (*ibid.*), the following statement from *Tower Enterprises, Inc.*, 182 N.L.R.B. 382, 387 (1970), enforced, 79 L.R.R.M. 2736 (9th Cir. 1972):

> It is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on the hope that such representative may be successful

> in negotiating wage increases. Certainly this appears to have been an important consideration in the instant case. A unilateral award of a wage increase by an employer following a union's demand for recognition results in giving the employees a significant element of what they were seeking through union representation. It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed. An employer may have the right to persuade the employees that representation is not in their best interests, but it does not have the right to threaten them or confer benefits on them which are designed to influence the employees against choosing a representative. When, as here, an employer does so, free choice in a subsequent election becomes a matter of speculation, so long as the effects of the interference remain unremedied.

The Board also cited (Pet. App. 21a) its decision in *Skaggs Drug Centers, Inc.*, 197 N.L.R.B. 1240 (1972), enforced, 84 L.R.R.M. 2384 (9th Cir. 1973), in which the Board explained that a bargaining order was justified in circumstances similar to those presented here because "our traditional remedies, which do not include a requirement that the wage increase be rescinded, cannot eradicate the impact of" an unlawful wage increase designed to thwart employee organizing interest. That "impact would continue to influence employee choice in [an] election were one to be directed * * *." 197 N.L.R.B. at 1241.

3. In affirming the Board's decision and enforcing its order, the court of appeals held that "[i]n light of the timing and the nature of the wage increase," there was substantial evidence to support the Board's

finding that the Company "shifted the wage schedule upward for the purpose of undermining support for the Union" (Pet. App. 1a; citation omitted). The Board's selection of a bargaining order as an appropriate remedy was upheld because, in the court's view, "[t]he evidence also support[ed] the Board's findings that the Union enjoyed majority support at the time that it demanded recognition, and that the unlawful wage increase undermined the Union's strength and prevented a fair election" (Pet. App. 2a).

ARGUMENT

In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court authorized the issuance of a bargaining order upon a showing that the unrecognized union at one point enjoyed majority status, and that the employer's unfair labor practices, although not "outrageous," "still have the tendency to undermine majority strength and impede the election processes." *Id.* at 613-614. In such circumstances, a bargaining order is proper "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election * * * by the use of traditional remedies * * * is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615.

1. The Company's primary argument for granting the petition is that the Board "offered no explanation for its issuance of a bargaining order" (Pet. 2), and that therefore the court of appeals' action in sustaining the Board conflicts with various decisions in other circuits requiring the Board to specify why a bargaining order is necessary under *Gissel* (Pet. 6-12). However, as shown above (see pages 4-5,

supra, and see Pet. App. 18a-21a), the Board explained in detail why it viewed the massive wage increase granted here as precluding a fair election and why it considered traditional remedies unlikely to dissipate the effects of the violation. Accordingly, the only question actually presented on this record is whether the facts of this case support the Board's judgment. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490, 494 (1951).

2. There is no merit to the Company's further contention (Pet. 12-13) that the Board departed from precedent in excluding Schubach from the unit. The Board's general policy is that temporary employees "who are employed on the eligibility date and whose tenure of employment remains uncertain, are eligible to vote." *Personal Products Corp.*, 114 N.L.R.B. 959, 960 (1955). And see *NLRB* v. *New England Lithographic Co., Inc.*, 589 F.2d 29, 33-34 (1st Cir. 1978). However, the Board has determined, in a case relied on here (Pet. App. 17a), that an employee expressly hired as a temporary replacement for an employee on maternity leave is ineligible to vote in a representation election. *Fearn International, Inc., Eggo Foods Div.*, 209 N.L.R.B. 232, 236-237 (1974). Therefore, the only issue actually raised by the petition is whether the Board properly found that Schubach was a temporary replacement for James. That issue turns on the particular facts of this case and does not warrant review by the Court.[4]

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[4] The Company's contention (Pet. 4, 12-13) that Schubach was expressly included in the unit by the Board's Regional Director in her Decision and Direction of Election in the representation proceeding (Pet. App. 90a-93a) is incorrect. As the Board pointed out, the Regional Director only found

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

BERNARD JEWELER
Attorney
National Labor Relations Board

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that the position held by Schubach at the time of the representation hearing—that of inventory control clerk—was a plant clerical position and, therefore, properly includable in the warehouse bargaining unit. No issue as to Schubach's individual status as a temporary or permanent employee was either raised or discussed in that decision (*id.* at 17a, 91a).

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